Supreme Court, U.S.
FILED
AUG 5 1996
CLERK

(3)

No. 95-1886

In the Supreme Court of the United States

OCTOBER TERM, 1995

Richard L. Frazier, Petitioner

v.

James B. King, Director
Office Of Personnel Management

On petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR THE PETITIONER

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5 pp

The Office of Personnel Management (hereinafter "OPM") continues to misstate the issue, and thereby confounds the need for this Court to review this arbitration proceeding. OPM asserts that the issue is whether the Court of Appeals for the Federal Circuit may overturn an arbitrator's award that applies the wrong legal standard to a determination of sexual harassment. Of course it may. Further, exactly as OPM asserts in its Brief, the Court of Appeals for the Federal Circuit exercises a unifying jurisprudence over federal issues of workplace conduct under the Civil Service Reform Act. That is not the issue. It is not the issue precisely because the arbitrator did find that the employee had sexually harassed the complainants. The issue before the arbitrator however, pursuant to the parties' submission, was whether the punishment was just. The issue before the court below therefore was whether an arbitrator who finds that an employee has misbehaved may nonetheless decide that his punishment was unjust when he also finds that management knew of the misconduct and condoned it. While the arbitrator's position in this regard was stated sloppily in his original award, his exposition of the matter upon OPM's Request For Reconsideration cannot leave any doubt of his intention. OPM's Brief In Opposition, nonetheless, makes no reference at all to the decision on reconsideration, and ignores the question submitted by the Petioner concerning the power of an arbitrator in such a case.

This central misdirection accounts for several subordinate problems in OPM's brief. Each of these will be addressed in a few sentences.

1. The Brief In Opposition urges repeatedly that this Court should continue to recognize the need for the Court of Appeals for the Federal Circuit to be free to unify federal employment law. Thus, the Brief In Opposition makes much of a supposed distinction between the cases cited by the Petitioner, all of which arose from private sector employment, and the need for a uniform federal law under the CSRA. If this distinction were valid, its consequence would be absurd. The issue is the power of an arbitrator to contravene a federal policy. The distinction asserted by OPM would grant an arbitrator greater power to contravene a federal policy when arbitrating private sector disputes than when arbitrating public sector disputes. This is obviously not the intent of any of the parties and contradicts *Devine v. Levin*, 739 F.2d 1567, 1569 (Fed. Cir. 1984), especially at footnote no.3.

2. The Brief In Opposition asserts that "an agency's prior tolerance of the employee's misconduct does not prevent the agency from taking adverse action to discipline such conduct." It offers no authority for this proposition. It does go on to cite *Intlekofer v. Turnage*, 973 F.2d 773 (9th Cir. 1992) for the proposition that federal agencies are obliged to discipline their employess for sexually harassing co-workers. That case, however, says nothing about the

first proposition; rather, to the contrary, it says that management must act swiftly to correct sexual harassment, and will be liable to an employee who is victimized by sexual harassment if it does not. If anything, *Intlekofer* supports an arbitrator's decision to hold management accountable for condoning sexual harassment by denying its right to punish an emplopyee whose behavior it condoned for years. The remarks of the arbitrator on reconsideration indeed make the very point. (See Petitioner's Brief, Appenix C-10.)

3. The only material which OPM offers in its Brief In Opposition to counter the Petitioner's development of the issue is at page 7 section 2: "in this case, moreover, petitioner had signed a statement acknowledging that he had received and read OPM's definition of sexual harassment and OPM's policy prohibiting sexual harassment in the workplace." To the contrary, the arbitrator found that the evidence on this point was contradictory and therefore was simply inconclusive. In short he did not make the finding which the OPM asserts in his brief. One point which is clear from *Intlekofer*, and legions of other cases, is that the court on appeal is bound by the facts found by the tribunal below so long as the record rationally supports those findings.

4. The OPM Brief In Opposition attempts further to distinguish *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) and *Chrysler Motors v. International Union*, 959 F.2d 685 (7th Cir.) cert. denied 506 U.S. 908 (1992), on the

ground that in those cases the arbitrator reduced an employee's punishment and in the present case the arbitrator eliminated the employee's discipline. This is an irrelevant matter of degree. Whether reduction or reversal, the two cases stand for the proposition that an arbitrator may consider management conduct in evaluating the justness of discipline.

In conclusion, the issue remains as stated by the Petitioner. OPM brief addresses a different issue. The case remains that one panel of the Court of Appeals upheld the arbitrator and another panel of the same court (not the court en banc) reversed the arbitrator on an issue that was not properly before it. The case remains further that the second panel on its own supplied a presumptive nexus between the employee's conduct and the efficiency of the service, when the issue was not addressed by the parties or the arbitrator during the arbitration, and when the Court of Appeals did not discuss or cite authority for the effect of the presumption but merely held abruptly that the employee had and failed to meet the burden of overcoming a presumption that nobody had even placed into issue. The case is not about sexual harassment. It is about the powers of the arbitrator and the Court of Appeals.